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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 599

EDWARD A. LEAHY,

Petitioner,

v.

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, AS STATE TREASURER, OKLAHOMA TAX COMMISSION, MELVIN CORNISH, W. D. HUMPHREY, AND JOHN T. BAILEY, AS MEMBERS OF THE OKLAHOMA TAX COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

CHARLES STUART MACDONALD,
Pawhuska, Oklahoma,
F. W. FILES,
Pawhuska, Oklahoma,
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

To the Honorables, Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward A. Leahy, most respectfully represents and shows to you as follows:

History of the Case.

The petitioner instituted this action in the District Court of Osage County, Oklahoma, on October 10, 1932. Later it

was taken by change of venue to the District Court of Oklahoma County in said State. (R. 20.)

Petitioner is a member of the Osage Tribe of Indians in Oklahoma and was enrolled as such under Act of Congress of June 28, 1906 (34 Stat. L. 539), and by authority of such act a certificate of competency was issued him May 24, 1924.

The said tribe of Indians is the owner of certain mineral resources which the United States holds in trust for it and its members under various acts of Congress, wherein it is provided that the same shall not be allotted to the individual members of the tribe, but reserved and the proceeds only therefrom paid them. (R. 12.)

In 1932, the State of Oklahoma, through the Oklahoma Tax Commission, demanded that petitioner make and file with it an income tax return including therein the amounts paid him as his pro rata share of the proceeds from said mineral resources. This demand the petitioner complied with and under notice and protest paid to the State the tax levied on such return. Then, as provided by the laws of said State, he brought this action to recover the amount so paid, on the theory, that the income he received as a member of said tribe of Indians was his proportionate part of the income from its said mineral resources which were under the control of the Federal government and therefore not subject to any State tax. (R. 8.)

The case was submitted to the court on the pleadings, all the facts being set forth therein and the same being undisputed. Judgment was rendered in favor of respondents and petitioner was denied the relief prayed for and all relief. (R. 25.)

Petitioner thereupon prosecuted proceedings in error to the Supreme Court of Oklahoma, which court, on June 18, 1935, handed down its decision affirming the judgment of the trial court and holding that petitioner had been fully

emancipated as a ward of the government and that when he was paid his share of the revenues from the mineral resources of his tribe, the same was received by him freed of all Federal restrictions and was, therefore, taxable by the State of Oklahoma. (R. 29.)

On June 28, 1935, and within the time allowed by law and the rules of said Supreme Court, petitioner filed his petition for a rehearing of said cause (R. 33), which was by said court on September 25, 1935, overruled and denied. (R. 34.) Thereafter petitioner duly filed his motion for a stay of mandate in said cause pending application for, and hearing of, a writ of certiorari which was by said court on September 26, 1935, granted and allowed. (R. 45.)

Reasons for Granting Petition for Writ of Certiorari.

A.

The Federal question of substance, and not theretofore directly determined by this Court (as to the power and authority of the State of Oklahoma to levy and collect an income tax from members of the Osage Tribe of Indians holding certificates of competency, and which tax is based on such members' pro rata share of the proceeds of the mineral resources of said tribe), was decided by said Supreme Court in favor of respondents by holding that such members, so far as the tax in question was concerned, occupied a position no different from that of any other citizens of the United States; that the duty on the part of the government to pay them their share of these proceeds and their power to use such income thereafter were absolute and consequently the same was paid and received free from all Federal restrictions and thus became subject to taxation at the hands of the State. Said decision has not been published but appears on page 55 of the transcript. Mr. Justice McNeill's dissenting opinion will be found on page 35 of the transcript.

B.

The said decision of the Supreme Court of Oklahoma is also probably not in accord with the applicable decisions of this court, including the cases of *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. Ed. 338; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 72 L. Ed. 709.

C.

A certified transcript of the record, certified by the Clerk of the Supreme Court on September 26, 1935 (R. 45), is transmitted herewith, and your petitioner, Edward A. Leahy, respectfully requests that same be filed as an exhibit to the petition for certiorari.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court to the Supreme Court of Oklahoma, commanding said court to certify to this Court a full and complete transcript of the record and of the proceedings in said Supreme Court had in the case numbered and entitled on its docket, No. 24,635, Edward A. Leahy, Plaintiff in Error, v. State Treasurer of Oklahoma, Ray O. Weems as State Treasurer; Oklahoma Tax Commission, Melvin Cornish, W. D. Humphreys, and John T. Bailey, as members of the Oklahoma Tax Commission, Defendants in Error, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Supreme Court of Oklahoma be reversed by this Court and for such further relief as this Court may deem proper.

Dated November 6, 1935.

EDWARD A. LEAHY,
By CHARLES STUART MACDONALD,
FRANK W. FILES,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of the State of Oklahoma has not been as yet officially reported. It was rendered on June 18, 1935, and thereafter a petition for rehearing was filed by the plaintiff in error, which was overruled and denied on September 25, 1935. Both the opinion and the dissenting opinion is copied in full in the record filed in this court on pages 29 and 35. The opinion, together with the dissenting opinion, appears in Pacific Reporter, Second Series, Advance Sheet November 1, 1935, page 570 (49 Pac. (2d) 570, not officially reported).

II.

Jurisdiction.

Jurisdiction of this Court is covered by the Judicial Code, Section 237b, as amended by the Act of February 13, 1925, and as provided by Rule 38 of the revised rules of this Court adopted June 5, 1928, effective July 1, 1928, and that the date of the judgment to be reviewed is September 25, 1935, and upon motion duly made in said cause the petitioner was granted a stay of mandate by the Chief Justice of the Supreme Court of Oklahoma for sixty days from the date of said judgment to enable the petitioner to file his petition for a writ of certiorari in the Supreme Court of the United States.

III.

Statement of Case.

A statement of the case has been given in the petition and, in the interest of brevity, will not be repeated here.

IV.

Specifications of Error.

1. The Supreme Court of the State of Oklahoma erred in affirming the decision of the District Court of Oklahoma County, Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in holding that your petitioner, an allotted Osage Indian, was liable to the State of Oklahoma for State income tax upon his pro rata quarterly payment paid to him as a member of the Osage Tribe of Indians, which income was derived directly from the mineral interests of said tribe, which said mineral interest is held in trust by the United States of America for the benefit of the Osage Tribe of Indians.

3. That the Supreme Court of the State of Oklahoma erred in not holding that the income derived by the said petitioner from mineral resources was part of the capital assets of said tribe and, therefore, was not subject to tax on distribution to the members thereof.

4. That the Supreme Court of Oklahoma erred in not holding that the income from the mineral resources was a part of the restricted corpus of the petitioner's property, and that the taxation thereof amounted to a permanent taking and depletion of such property and, therefore, interferes with a Federal instrumentality which is exempt from the State taxing power.

Argument—Summary.

The Act of June 28, 1906, entitled "An Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory, and for Other Purposes," provided, among other things, that the lands of the tribe (with cer-

tain exceptions) should be divided among the members thereof by giving to each his or her fair share thereof in acres, and providing that each member should be entitled in his first selection to one hundred and sixty (160) acres, and that after each member had made his first selection he should be permitted to make a second selection of one hundred sixty (160) acres, and that, after each member had made his second selection, he should be permitted to make a third selection of one hundred sixty (160) acres, and that he should designate which one of his selections should be his homestead, and his certificate of allotment and deed should designate the same as such.

It is also provided that, after each member had made his first, second and third selections of one hundred and sixty (160) acres, the remaining lands of the tribe (with certain exceptions) should be divided as equally as practicable among the members by a commission to be appointed to supervise the selection and division thereof.

The minerals under all of the Osage lands were expressly reserved to the tribe by Section 3 of said Act, which is as follows:

> "That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is hereby made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of lands herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: And provided further, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the home-

stead selections herein provided for without the written consent of the Secretary of the Interior: Provided, however, That nothing herein contained shall be construed as affecting any valid existing lease or contract."

All funds belonging to the tribe and money due, or that might become due, were to be held in trust by the United States for a period of twenty-five (25) years from and after January 1, 1907 (with certain exceptions).

The first subdivision of Section 4 of the Act is as follows:

"That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage Tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: Provided, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: And provided further, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

The second subdivision of said section is as follows:

> "That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided."

After the expiration of the period of twenty-five (25) years from January 1, 1907, the lands, mineral interests and monies, provided in said Act to be held in trust, should become the absolute property of the individual members of the tribe according to the rolls provided for in the Acts unless otherwise provided by Act of Congress. This trust period has now been extended by the Act of March 2, 1929 (45 Stat. L. 1478), until January 1, 1959, unless otherwise provided by Act of Congress.

Section Nine of the Act of June 28, 1906, *supra*, provided for the biennial election of officers for the Osage Tribe. It is as follows:

> "That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief and eight members of the Osage Tribal Council to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in

June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined."

It will, therefore, be observed that the oil, gas and other mineral rights were not allotted in severalty to the various members of the tribe but were reserved to said tribe in common; that the lands should be leased by the tribe through its tribal council with the approval of the Secretary of the Interior—funds derived therefrom to be deposited in the Treasury of the United States to the credit of the members of the tribe and to be thereafter disbursed to the individual members according to the roll in the manner and at the same time payments are made of interest on other funds held in trust for the Osages by the United States Government.

It will be observed that Congress preserved the tribal government of the Osages and provided a manner in which their officers should be elected and authorized such officers to act for the tribe in its semi-sovereign capacity.

The certificate of competency issued to your petitioner, under Subdivision seven (7) of section two (2) of said Act, authorized your petitioner to sell and convey any of the *lands deeded to him* (*except his homestead*), *but it did not authorize him to sell the oil, gas, or other minerals* covered by said lands, which minerals were expressly reserved to

the use of the tribe, nor did it authorize him to sell, or convey his interest (or any part thereof) in the minerals underlying the original reservation, which was allotted in severalty under the Act of 1906, or said tribe, and, as to said minerals, he is still restricted.

As above stated, *the mineral rights have never been allotted in severalty, nor has any member of the Osage Tribe, regardless of quantum of blood, or the issuance of a certificate of competency, ever been authorized by Congress to sell or dispose of his interest in said minerals so reserved to the tribe.*

The Act of April 12, 1924 (34 Stat. L. 94), being an Act amendatory of the Act of June 28, 1906, provides that any right to, or interests in, the lands, monies, or mineral interests, as provided in the Act of Congress approved June 28, 1906, and amendatory and supplementary acts thereof, vested in, determined, or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior and not otherwise be sold, assigned, and transferred under such rules and regulations as the Secretary of the Interior may prescribe.

There is no Act of Congress authorizing any member of the Tribe, whether he had a certificate of competency or not and regardless of quantum of blood, to sell, assign or transfer his interests in the tribal mineral properties, or in any other tribal property.

Supporting Reasons—A.

It is submitted that the court below erred in holding that the money paid to this petitioner as his part of the proceeds of the Osage Tribe of Indians derived from the mineral interests of said tribe was subject to an income tax levied by the State of Oklahoma. The mineral resources of the Osage Tribe of Indians are reserved to the tribe as a whole, and

the income derived from royalties and bonus payments are distributable quarterly to such members regardless of their status. To tax this income would amount to a permanent taking of the corpus of the property which permanently depletes its value. That the imposition of such tax would interfere with the Federal instrumentality under which the development for oil and gas for the benefit of the Osage Tribe of Indians is carried on by the Secretary of the Interior of the United States of America under appropriate acts of Congress.

In the case of *Choteau* v. *Burnett,* 283 U. S. 691, 75 L. Ed. 1353, there was involved the question as to whether or not the income of a member of the Osage tribe of Indians who had received his certificate of competency, and which income came from his interest in the mineral resources of the tribe, fell within the purview of the Federal income tax law. The Supreme Court held that it did.

The question of the right of the State to impose a tax is disposed of in that case under the following language:

> "Royalties received by the government from mineral leases of Indian lands have been held to be beyond a state's taxing power (*Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171; *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 72 L. ed. 709, 48 S. Ct. 333, *supra*) on the ground that, while in the possession of the United States they are a Federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a Federal Tax. * * *."

Pollock v. *Farmers Loan & Trust Company,* 157 U. S. 429, 39 L. Ed. 759;

Jaybird Mining Co. v. *Weir,* 271 U. S. 609, 70 L. Ed. 1112;

Gillespie v. *Oklahoma,* 257 U. S. 501, 66 L. Ed. 338, 42 S. Ct. 171;

Quarles v. *Dennison,* 38 F. (2d) 662;

DeNoya v. *Arrington* (Okla.), 20 P. (2d) 563, 568;

Supporting Reasons—B.

The decision of the Supreme Court of the State of Oklahoma in this case is most certainly not in accord with the decisions of the Supreme Court of the United States in similar matters.

Gillespie v. *Oklahoma, supra;*
Pollock v. *Farmers Loan & Trust Company, supra.*
Jaybird Mining Co. v. *Weir, supra.*

Supporting Reasons—C.

The dissenting opinion in the above case, written by Chief Justice McNeill of the Supreme Court of the State of Oklahoma and concurred in by Mr. Vice-Chief Justice Osborn and Mr. Justice Riley, is a brief within itself and gives ample reasons for review of this case. The opinion shows that a great deal of time was spent in exhaustively examining the various treaties, Acts of Congress and the decisions of the court bearing thereon. No doubt, the conclusion reached in this dissenting opinion is correct. No part of this dissenting opinion will be quoted here since the same appears in the record.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that your petitioner may have justice, and that a writ of certorari should be granted, and this court should review the decision of the Supreme Court of the State of Oklahoma and finally reverse the same.

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